In the Matter of	)	
	)	
UNITED STEELWORKERS OF AMERICA, LOCAL 8599	)	**OPINION AND AWARD**
Union	)	
vs.	)	**SMCS Case No. 973730**
FONTANA UNIFIED SCHOOL DISTRICT	)	
	)	
Employer	)	
	)	
	)	

APPEARANCES

For the Employer: Sherry G. Gordon
Atkinson, Andelson, Loya, Ruud & Romo
3612 Mission Inn Ave, Upper Level
Riverside, CA 92501

For the Union: Jerry Mongello
United Steelworkers of America
927 S. Village Oaks Drive, Suite 100
Covina, CA 91724-3604

INTRODUCTION

United Steelworkers Local 8599 (the Union) has pursued this grievance on behalf of C*** M*** (grievant). M*** claims that she has been working out of title since her supervisor at Fontana United School District (the District) gave her the task of finding substitute teachers for periods five and six each school day. The District claims that the grievance is untimely. The District also claims that the work performed by M*** was within her job classification.

Hearings were held on September 15 and October 6, 1998. Briefs were received on November 9, 1998.

ISSUES

The following issues have been submitted to this arbitrator[1] :

1. Is this grievance timely under Article 16 of the Collective Bargaining Agreement?

2. If the grievance is timely, did the District violate Articles 11, 12 and/or 45 when it assigned grievant, who is an intermediate secretary at Fontana High School, to assist in locating period substitute teachers?

3. If the grievance is timely, and the District did violate Collective Bargaining

Agreement, what is the appropriate remedy?

FACTS

Grievant Cindy M*** has been employed by the District for 20 years. M*** was originally hired as an Intermediate Clerk Typist. M*** worked at the Junior High School until 1984. At that time she successfully bid on and was transferred to a position at Fontana High School. In August of 1995, M's position was reclassified to Intermediate Secretary. At all relevant times, M's immediate supervisor has been Laverne McCoy-Byers, an Assistant Principal at Fontana High School.

Fontana High School finds and uses two kinds of substitute teachers. Normally, when a teacher is going to be absent the entire day, a substitute teacher is assigned to cover all of that absent teacher's classes. When a teacher is only going to miss part of a school day, the District attempts to cover the particular period(s) being missed with volunteers from the full time teaching staff. Up until January of 1997, Bernie Child, the High School Secretary, who worked

[1] This arbitrator was selected from a panel submitted by the State Mediation and Conciliation Service.

for the High School Principal, was in charge of locating and assigning both full day and "period" substitute teachers.

In late November of 1996, Lou Ann Archbold, the High School Principal, notified her three Assistant Principals that the task of finding period substitute teachers was going to be delegated to their secretaries. According to both Archbold and McCoy-Byers, this modification was needed because Child was overburdened as a result of growth in the school's student population. In addition, at the time of the reassignment, Archbold and the three Assistant Principals were new to their positions.

McCoy-Byers assigned M*** the task of finding period substitute teachers for periods five and six. Fritzie Cochran, another Intermediate Secretary, was assigned the task of finding substitute teachers for periods three and four. Eleanor ("Ellie") Chambers, a Senior Secretary II, was assigned the task of finding substitute teachers for periods one and two.

M*** testified that McCoy-Byers told her that the assignment was going to be temporary. According to M***, this assignment was only going to last until Child retired and a new High School Secretary was hired.[2] M*** testified that at the time of the assignment, Child had only six months left before she was going to retire. M*** also testified that Child didn't have the computer skills necessary to do her job and that the District was going to wait until a replacement was found rather than forcing Child out. M*** thought that a new secretary with

[2] Archbold testified that there were rumors about Child's impending retirement as early as November, 1996. However Child did not send in her notice of intention to retire until October 13, 1997. (Exh. 20.)

the requisite skills would be able to take back the task of assigning period subs. McCoy-Byers testified that she never told M*** that the assignment was temporary.

Ellie Chambers, one of the other secretaries who had been delegated the task of finding period subs testified at the hearing. Chambers testified that her supervisor, Assistant Principal Pamela Schrack, told her that the assignment was temporary and was only going to last until Child retired. Chambers also protested the assignment. On November 15, 1996, she sent a letter to Schrack which indicated that she would do the work "under protest." (Exh. 2.) Copies of her protest were sent to the Union and to Dr. Patricia Peoples, the District's Assistant Superintendent who had responsibility for personnel matters.

On January 7, 1997, M*** sent a memo to McCoy-Byers claiming that the task of finding period subs was extremely time-consuming, taking up to four hours if many subs were needed.[3] M*** also complained that task was outside her job description and requested that she be given differential pay for the work. (Exh. 2.) Neither M*** nor Chambers filed a grievance.

Bernie Child did not retire until December of 1997, more than a year after the task of finding periods subs had been delegated to M*** and the other secretaries. On January 5, 1998, a new High School Secretary was hired but M*** was not relieved of the task of finding period subs. When M*** went to find out whether the task was going to be taken from her she was told that she had to continue to do it.

On January 15, M*** and two union representatives (Sean Kingsley and Yvonne Alanez) met with McCoy-Byers about M***'s concern about continuing to find period subs even after

[3] At the hearing, M*** testified that the time required to find subs varied from as little as fifteen minutes to as much as several hours.

Child had been replaced. At that meeting, McCoy-Byers indicated her belief that the task of finding period subs was not interfering with M***'s job and that M*** could handle it. That same day, the instant grievance was filed. (Exh. 3.)

M*** continued to find period subs until the end of the 1997-98 school year. At M***'s request, on September 10, 1998, McCoy-Byers sent M*** a memo directing her to continue to find period subs for fifth and sixth period. (Exh. H.) However M*** testified that she has not actually been required to find subs since school began this past September.

DISCUSSION

Was the Grievance Timely?

Throughout the grievance procedure, the District maintained that the grievance was untimely. (See, e.g., Exh's. 4 and 7.) At the hearing, the District requested that this arbitrator rule in its favor on the timeliness issue and not hear the merits. Because the resolution of the timeliness issue appeared to depend on disputed factual questions regarding representations made at the time of the assignment and events which occurred between the initial assignment and the filing of the grievance, this arbitrator deferred a final ruling on the timeliness issue and took testimony on both the timeliness issue and on the merits. For reasons that will be discussed, I find that the District is correct in arguing that the grievance was not timely.

The Collective Bargaining Agreement governing this grievance provides: No later than twenty (20) days following the act or omission giving rise to the grievance or no later than twenty (20) days following the date upon which the employee reasonably should have known of the act or omission the grievant must present such grievance in writing on an appropriate form to the immediate supervisor. (Joint Exh. 1, p. 32.)

Both sides agree that M*** was assigned the task of finding period subs in November of 1996 and started performing the task in January of 1997. The record also shows that the grievance was not filed until January 15, 1998, more than a year after the assignment began. (Exh. 3.) Thus, the District's claim seems prima facie valid and it is incumbent upon the Union to justify the extensive delay.

The primary argument raised by Union at the hearing was a claim that M*** was told that the assignment was only temporary and that she was not going to have to continue doing the alleged out of title work once a new secretary was hired by the District. According to the Union, M*** filed within 20 days of learning that the assignment was going to be permanent and thus M***'s grievance was timely. I cannot accept that argument.

First, there is a serious question as to whether anyone ever told M*** that the assignment was only temporary. Archbold never told McCoy-Byers that it was a temporary assignment. This is consistent with and supports McCoy-Byers' testimony that she never told M*** that the assignment was temporary. Some circumstantial evidence of the fact that the assignment was not temporary is also found in Chambers' letter of protest, which describes the assignment as on-going. (Exh. 2.)

Second, M***'s testimony on this issue was less than compelling. Although M*** testified that McCoy-Byers told her that the position was temporary and that she would only have to do the task until Child retired and a new secretary was in place, M***'s testimony on this issue, while somewhat confused, suggests that this conversation with McCoy-Byers took place long after the M*** was first given the assignment.

At one point M*** testified that Child only had six months left at the time M*** made

the inquiry of McCoy-Byers. Since Child retired in December of 1997, it would appear that the conversation took place in mid-1997. At another point, M*** indicated that the critical conversation with McCoy-Byers took place some time between September and December of 1997. In either event, M*** worked for six months without any express representation that the assignment was only temporary. If, as M*** claims, the distinction between a temporary and permanent assignment was critical in her mind, she should have protested the out of title work back in January of 1997.

That M*** was never expressly told that the assignment was temporary is also suggested by a letter that M*** sent to the Board of Education on March 9, 1998. (Exh. R.) In that letter, M*** states that she was assigned the task in November of 1996 and did it through then end of that school year. M*** then states that she was asked to continue doing the work at the beginning of the 1997-98 school year. Her letter then goes on to say that she "understood" that the assignment would be temporary and that she "was under the impression" that the principal's new secretary would take over the job. However she doesn't indicate that this was promised to her by McCoy-Byers or anyone else.

Significantly, M*** did complain about the out of title work on January 7, 1997, when she wrote a memo to McCoy-Byers which stated: AI feel that since finding substitute coverage is not in my job description ... that I shouldn't have [sic] do this job.... "[I]f I am asked to continue doing this additional duty, I am requesting that I get the differential pay for the hours it takes to get the job done." (Exh. 2.) That memo was also sent to the Union. Neither M*** nor the Union ever followed up with a grievance. M*** testified that she was waiting for a response from the District but offered no explanation for waiting over a year.

In its brief, the Union argues that grievance was timely because M*** complained on January 7, 1997 and the District failed to respond in a timely manner. (Union Brief at pp. 8, 11-12.) According to the Union, the issue was "held hostage by the District's failure to respond. Had the Union filed within a few months of the January 7 complaint, I might accept an argument that the grievance was timely because M*** was simply giving the District a reasonable opportunity to respond before filing a grievance. But at some point, after the District failed to respond, the delay became the grievant's. Reasonable minds could differ on exactly where that point is. But it is surely well less than a year from the time of grievant's initial complaint to the District.

The Union also argues that it has been the practice by the parties to let the complaints ... run [sic] there course before filing a grievance. (Union Brief at p. 12.) There are two problems with this response. First, the Union failed to adduce testimony to support this assertion. Second, this dispute was not "running it course." The informal complaint was being ignored by the District. As a result, the Union had an obligation to invoke the grievance procedure in a timely manner.

As sympathetic as I might want to be towards the grievant, the time limits are jurisdictional. The Collective Bargaining Agreement provides:

> The arbitrator's authority shall be limited to deciding the issues submitted by the parties; and the arbitrator shall have no power or authority to add to, subtract, from, alter delete, amend, or modify the terms of the Agreement. Should the arbitrator determine that time limits are exceeded, the arbitrator shall not have the authority to hear the grievance(s) without mutual agreement of the parties. (Joint Exh. 1, p. 34.)

Such jurisdictional limits are routinely upheld by arbitrators in similar situations. (See, e.g. In re Naval Supply Center (1985) 85 Lab.Arb. 655 [Harkless]; In re Perfection-Cobey Company

(1987) 88 Lab.Arb. 257 [Duda].) The inclusion of such time limits also serves a legitimate labor relations function. As explained by Arbitrator Lawson, "such a procedure limits the liability of the Employer, assures that witnesses' recollections will be fresh and promises that problems will be addressed shortly after they arise, thereby promoting harmony at the work place." (In re Niagara Frontier Transportation Authority (1985) 85 Lab.Arb. 229.)".

There are situations where strict adherence to time limits can be excused. For example, in In re Dunlop Tire Corp. (1987) 88 Lab.Arb. 262, arbitrator Gentile refused to strictly enforce a three day time limit when the collective bargaining agreement gave a discharged employee the right to present additional evidence and the grievance was filed six days after the discharge but only one day after the Union learned that the company had found the employee's additional evidence insufficient to revoke the discharge. Similarly, in In re Hughes Aircraft Co. (1987) 89 Lab.Arb. 205, arbitrator Richman found the employee's mental condition created an equitable toll on the running of the period of limitations.

Here if M*** had been unfamiliar with the collective bargaining agreement and the procedures for dealing with assignments thought to be out of title, equitable considerations might suggest less than strict compliance with the time limits imposed by the agreement and a resort to the "continuing wrong" approach. (See, Elkouri & Elkouri, How Arbitration Works, (5th ed., 1997) pp. 281-282.) But this was not the case. The record shows that M*** successfully instituted a reclassification request in March of 1995 when she perceived that she was performing work outside of her job classification. (Exh. 20.)

In addition, the record shows that the Union was aware of the issue from the time of the initial assignment. Yvonne Alanez, the union representative for grievant at Step One, testified

that she had helped Ellie Chambers draft her November 15, 1996 letter of protest. Alanez testified that she has been a grievance representative for the Union for the last two and a half years. As such, she is charged with knowledge of the grievance procedure and the time limits contained in the collective bargaining agreement. Alanez testified that she understood that Child was not going to retire until December 1997. Thus she knew that this alleged out of title work was likely to be continue for at least a year.

Shawn Kingsley, the other Union representative involved with this grievance, testified that he, too, was aware that M*** had been performing the alleged out of title work for a year prior to the filing of the grievance. He testified that the grievance was not filed sooner because of the alleged representation that the assignment was temporary. However Kingsley had no independent knowledge that the assignment was supposed to be temporary and relied on M***'s testimony, which I have already rejected as unsupported.

Accordingly, there is no basis for my failure to enforce the rights and limits contractually agreed upon by the parties. M*** and the Union both knew of the alleged contract violation in January of 1987 and failed to file a grievance until January of 1988. Accordingly, I find that the grievance is untimely.

AWARD

The grievance is not arbitrable because it was not filed within the time limits specified in the collective bargaining agreement.

Dated: December 6, 1998

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Jan Stiglitz